Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF AMICUS, PROFESSOR BERNARD SCHWARTZ, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

BERNARD SCHWARTZ
Chapman Distinguished
Professor of Law
University of Tulsa
College of Law
3120 East 4th Place
Tulsa, Oklahoma 74104
(918) 631-3706

Dated: August 4, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

QUESTION PRESENTED

Whether the Supreme Court of Oklahoma may decline to be bound by the decisions of this Court interpreting the Due Process Clause of the Fourteenth Amendment and hold, despite those decisions, that a regulatory agency member may never be disqualified for bias in a ratemaking proceeding.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Interest of Amicus 1

Argument 2

I. The Oklahoma Supreme Court's Decision Violates Due Process Because it Failed to Require an Impartial and Unbiased Decisionmaker in a Particularized Ratemaking Proceeding 3

II. The Oklahoma Supreme Court Erroneously Applied the Rule of Necessity 12

Conclusion 13

TABLE OF AUTHORITIES

Page

CASES:

American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966) 11

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) 6

Business and Professional v. Barnich, 614 N.E.2d 341 (Ill. App. 1993) 11

Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583 (D.C. Cir. 1970) 11

Concrete Pipe & Prod. v. Const. Laborers Pen. Tr., 113 S.Ct. 2264 (1993) 3, 12

Delta Air Lines, Inc. v. CAB, 497 F.2d 608 (D.C. Cir. 1973) 12

General Motors Corp. v. Rosa, 624 N.E.2d 142 (N.Y. 1993) 3, 13

Gibson v. Berryhill, 411 U.S. 564 (1973) 11

Goldberg v. Kelly, 397 U.S. 254 (1970) 3

Jarrott v. Scrivener, 225 F.Supp. 827 (D.D.C. 1964) 13

Liteky v. United States, 114 S.Ct. 1147 (1994) 3

Londoner v. Denver, 210 U.S. 373 (1908) 6

Mass. Auto Rating & ACC v. Commissioner, 516 N.E.2d 1132 (Mass. 1987) 11

Michigan Intra-State Motor v. PSC, 504 N.W.2d 677 (Mich. App. 1993) 11

National Labor Relations Board v. Phelps, 136 F.2d 562 (5th Cir. 1943) 3

TABLE OF AUTHORITIES – Continued

Page

New England Tel. & Tel. Co. v. PUC, 448 A.2d 272 (Me. 1982) 11

New Orleans Public Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 5

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 206 (1937) 5, 6, 7

Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966) 12

Reagan v. Abourezk, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987) 12

Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission, 873 P.2d 1001 (Okla. 1994) 2

Spring Valley Water-Works v. Schottler, 110 U.S. 347 (1884) 4, 11

Stahl v. Board of Supervisors, 175 N.W. 772 (Iowa 1920) 12

State v. Aldridge, 103 So. 835 (Ala. 1925) 13

Tumey v. Ohio, 273 U.S. 510 (1927) 11

Withrow v. Larkin, 421 U.S. 35 (1975) 2, 3

United States v. Florida East Coast R. Co., 410 U.S. 224 (1973) 6

Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519 (1978) 7

Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972) 11

West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63 (1935) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

OKLA. CONST. art. 9, Sec. 18 .....10, 12

OKLA. STAT. tit. 75, Sec. 250.3 (West Supp. 1994) 5, 9

MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(3) (1946). 8

MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1-102 (1981) 8

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Proceeding in the Committee of the Whole, August 23, 1960, at 8 (comments of Professor Merrill) 8

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) commentary at 11 (1961) 8

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) (1961) 8

ARTICLES AND TREATISES:

Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. REV. 1067 (1992) 4

II KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (1994).....4, 7

Henry Friendly, *"Some Kind of Hearing,"* 123 PENN. L. REV. 1267 (1975) 4

Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act,* 17 OKLA. L. REV. 1 (1964) 9, 12

TABLE OF AUTHORITIES – Continued

Page

Martin Redish and Lawrence Marshall, *Adjudicatory Independence and the Values of Due Process*, 95 YALE L.J. 455 (1986) 4

BERNARD SCHWARTZ, ADMINISTRATIVE LAW (3d ed. 1991) 1, 4, 7, 10, 13

BERNARD SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK (Little Brown, 4th ed. 1994) 2

No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

— v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF OF AMICUS, PROFESSOR BERNARD SCHWARTZ, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

I am not representing a client, and the views expressed in this Petition are my own. I have no monetary interest in this or any other ratemaking case (though I am a customer of Petitioner). Aside from wishing to assist the Court, my interests in the case are entirely academic. I am the Chapman Distinguished Professor of Law at the University of Tulsa College of Law. I have taught administrative law since 1947, both at New York University and the University of Tulsa. I am author of a treatise and a casebook on administrative law – ADMINISTRATIVE LAW (Little Brown, 3d ed. 1991); ADMINISTRATIVE

LAW: A CASEBOOK (Little Brown, 4th ed. 1994) – as well as numerous articles on the subject.[1]

ARGUMENT

The Oklahoma Supreme Court's decision in *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, 873 P.2d 1001 (Okla. 1994), violates basic constitutional and administrative law principles. Its cavalier disregard for that fundamental principle of due process – a "fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) – warrants this Court's review and reversal. The Oklahoma Court's conclusion that particularized ratemaking is "legislative" in nature, and, therefore, without need of an impartial decisionmaker ignores the reality that particularized ratemaking affects and is directed toward specific persons in specific factual settings; it is not an exercise of general policy making authority. The fatal flaw in the Oklahoma Court's logic is that it allows an historical label – ratemaking is legislative – to dictate the parameters of the procedural requirements without inquiry into the nature of the ratemaking proceeding.

This amicus brief will address two issues: 1) the applicability of the due process requirement of an impartial decisionmaker in a particularized ratemaking proceeding; and 2) the inapplicability of the Rule of

[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of this Court.

Necessity where a quorum of the decisionmaking body remains after one member is disqualified for bias.

I. THE OKLAHOMA SUPREME COURT'S DECISION VIOLATES DUE PROCESS BECAUSE IT FAILED TO REQUIRE AN IMPARTIAL AND UNBIASED DECISIONMAKER IN A PARTICULARIZED RATE-MAKING PROCEEDING.

The Fourteenth Amendment mandates that any individualized state deprivation of property be preceded by "due process." An unbiased tribunal lies at the core of the due process requirement; it has, indeed, been characterized as "[o]ne of the very objects of Law." *Liteky v. United States,* 114 S.Ct. 1147, 1158 (1994) (Kennedy, J., concurring in judgment). *See e.g. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.,* 113 S.Ct. 2264, 2277 (1993) ("Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator); *Withrow v. Larkin,* 421 U.S. 35, 46 (1975) ("a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies as much to administrative agencies which adjudicate as to courts"); and *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970) ("of course, an impartial decisionmaker is essential).[2] From the dawn of the modern administrative state,

---

[2] *See also e.g., National Labor Relations Board v. Phelps,* 136 F.2d 562, 563 (5th Cir. 1943) (right to an unbiased adjudicator is the essence of due process and may be even more important in agency adjudications where other procedural safeguards may have been relaxed); and *General Motors Corp. v. Rosa,* 624 N.E. 2d 142, 144 (N.Y. 1993) ("The participation of an independent, unbiased adjudicator . . . is an essential element of due process," fully applicable to administrative proceedings). Many

the courts have applied these principles to administrative agencies; including those engaged in ratemaking. *See e.g., Spring Valley Water-Works v. Schottler,* 110 U.S. 347, 354 (1884) (municipal agency charged with setting water rates had "duties [that] are judicial in nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination." This includes "the principle that no man shall be judge in his own cause," *Ibid,* and the requirement of "an impartial tribunal," *Id.* at 383, Field, J., dissenting).

Indeed, the Oklahoma Supreme Court acknowledges as much. For the Oklahoma Court, the distinction between adjudication and rulemaking and the placement

---

commentators have also recognized the pivotal importance of an unbiased tribunal to meeting the demands of due process. *See e.g.,* II KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE Sec. 9.8 (1994) ("Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking"); Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals,* 39 UCLA L. REV. 1067, 1143 (1992) ("An essential element of adjudication is that a decisionmaker be impartial); BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 6.17 (3d ed. 1991) ("Due process requires an impartial tribunal to ensure a fair hearing before a neutral and unbiased decision-maker"); Martin Redish and Lawrence Marshall, *Adjudicatory Independence and the Values of Due Process,* 95 YALE L.J. 455, 475 (1986) ("It is our position that the participation of an independent adjudicator is such an essential safeguard, and may be the only one."); and Henry Friendly, *"Some Kind of Hearing,"* 123 PENN. L. REV. 1267, 1278-79 (1975) ("there is wisdom in recognizing that the further the tribunal is removed from . . . any suspicion of bias, the less may be the need for other procedural safeguards").

of ratemaking within the latter category was "determinative of the issue presented, for . . . proceedings which are legislative in nature do not implicate judicial process and do not require application of [ ] judicial standards." 873 P.2d at 1005. The Oklahoma Court's error was that it allowed labels and not the nature of the proceeding to dictate the parameters of due process.[3]

The implication of the due process guarantee depends upon the nature of the proceeding not its historical and artificial label. As this Court has recognized, the characterization of ratemaking as rulemaking, *see e.g., New Orleans Public Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 371 (1989) (exploring the contours of the *Younger* abstention doctrine) is not dispositive of the due process issue. In *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 206 (1937), the Court said: "The fundamentals of a *trial* were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record." *Id.* at 300 (emphasis added).[4] In reversing the decision of the Ohio Supreme Court upholding

---

[3] Ironically, Oklahoma administrative law does not juxtapose "rulemaking" and "adjudication", preferring instead the labels "rulemaking" and "individual proceeding" for the very purpose of excising ratemaking from "rulemaking." *Compare* OKLA STAT. tit. 75, Sec. 250.3(2)(b) (West Supp. 1994) ("Rule . . . does not include: . . . the approval, disapproval or prescription of rates") *with id.* at Sec. 250.3(6) (individual proceeding). *See infra* at 9.

[4] Like *Ohio Bell*, the instant case involved a rate proceeding where the regulatory body was to determine the extent of a refund to utility customers.

the Commission's rate order, the Court said that especially in these quasi-judicial administrative proceedings "the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement." *Id.* at 304-305 (citations omitted).

This Court, in *United States v. Florida East Coast R. Co.*, 410 U.S. 224 (1973), citing *Ohio Bell* along with *Londoner v. Denver*, 210 U.S. 373 (1908) and *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), established guidelines for determining when an agency proceeding is judicial in nature for purposes of due process analysis. The Court said that its "decisions represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." 410 U.S. at 245.[5] The particularized

---

[5] [T]he most frequently used test to distinguish [rulemaking and adjudication] is that of time: Judicial power determines the rightfulness of acts done; legislative power prescribes the rules for acts to be done. . . . Even if agency action is legislative under the time test, if it is particular in its applicability, its effect may be much the same as that of an adjudicatory decision. . . . If the administrative process is directed at particular persons – even if it be termed rulemaking – those affected should be given the same hearing rights as in proceedings that are clearly judicial in nature.

ratemaking of *Ohio Bell*, where the "fundamentals of a trial" were required, was distinguished from "across the board" or generalized rate orders, which involved "the formulation of a basically legislative-type judgment." *Id.* at 245-46. *See also Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978) ("even in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a very small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process"); and *West Ohio Gas Co. v. Public Utilities Commission*, 294 U.S. 63, 70 (1935) ("fundamentals of a fair hearing" must be afforded utilities in particularized rate cases).

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") followed the Court's teaching that a quasi-judicial or adjudicative tone inheres in particularized ratemaking proceedings. The NCCUSL has adopted three Model State Administrative Procedure Acts: in 1946, 1961, and 1981. Each model act excises

---

BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 5.8 (3d ed. 1991). *See e.g.*, II KENNETH CULP DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE Sec. 9.2 (1994) ("The Due Process Clause requires a hearing of some kind only when government deprives an individual of 'life, liberty, or property' based on resolution of contested factual issues concerning that individual. . . . The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system").

particularized ratemaking from the rulemaking nomenclature, placing it, instead, within the adjudicative rubric. The 1961 Model Act, which was adopted with modification in Oklahoma, clearly treats ratemaking as adjudicative in nature. It defines "contested case"[6] as "a proceeding, including but not restricted to ratemaking,[7] . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) (1961).[8] In

---

[6] "The term 'contested case' is used in the Model Act, instead of the word 'adjudication' as found in the Federal Act, to avoid the possible confusion in terminology that might result from the fact that *ratemaking* under the Federal Act is classified as 'rule making' with special procedures applicable to it, whereas under the Model Act it is desired to apply the contested case procedures to ratemaking." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(2) commentary at 11 (1961).

[7] The NCCUSL had intended to include particularized "ratemaking" within the definition of "contested case" in 1946 when it defined that term as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1(3) (1946). The 1961 Model Act made this explicit because courts, on occasion, had erroneously treated ratemaking as a rulemaking proceeding under the 1946 Act; "[t]he real purpose of it is to evade the possibility of other courts following that unfortunate precedent." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Proceeding in the Committee of the Whole, August 23, 1960, at 8 (comments of Professor Merrill).

[8] The 1981 Model Act is more nuanced in its distinction between an agency's quasi-legislative and quasi-judicial functions. It defines "Order" as "an agency action of particular applicability" affecting "one or more specific persons." MODEL STATE ADMINISTRATIVE PROCEDURE ACT Sec. 1-102(5) (1981). In

adopting the 1961 Model Act in modified form, Oklahoma explicitly excluded ratemaking from rulemaking: " 'Rule' . . . does not include: . . . b. the approval, disapproval or prescription of rates." *See* OKLA STAT. tit. 75, Sec. 250.3(2)(b) (West Supp. 1994). The purpose of this provision was to make clear that "a modern rate fixing proceeding, with its specified parties, its adversary procedure . . . preeminently is adjudicative." Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 9 (1964).

Although the Oklahoma Corporation Commission is not bound by the Oklahoma Administrative Procedures Act,[9] the Oklahoma constitutional provisions creating the Commission recognize the distinction between particularized and generalized fact finding and determination. "Before the Commission shall prescribe or fix any rate . . . directed against any one or more companies by name, the company or companies to be affected by such rate . . . shall first be given notice . . . and shall be afforded a reasonable opportunity to introduce evidence and be

---

contrast, "Rule" is defined as "an agency statement of general applicability." *Id.* at (10). Particularized ratemaking requires an "Order" and ratemaking of general applicability can be created by "Rule."

[9] "[P]ractical politics" exempted the Corporation Commission from the Oklahoma APA. *See* Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 4 (1964). For Merrill, excluding the Corporation Commission was not cause for too great an alarm because the Commission "operate[s] under very fully developed and sophisticated procedures. . . . The [APA] provides minimal standards of fair procedure. A large part of the procedural requirements of [the Corporation Commission] go beyond these minima." *Id.*

heard thereon, to the end that justice may be done." OKLA. CONST. art, 9, Sec. 18. In contrast, in the process for promulgating "any general order, rule, requirement, not directed against any specific company or companies by name" only newspaper notice with a general opportunity to object is all that is required. *Id.* The Oklahoma Constitution and the Oklahoma statutes reflect the correct understanding that agency action of particular applicability, including ratemaking, implicates constitutional due process concerns.

Academia also recognizes ratemaking's duality; when the ratemaking process leads to an "Order" of general applicability, it is legislative in nature, but when it leads to an "Order" directed at one or few entities, it is essentially adjudicative in function.

> Ratemaking . . . is normally particular in applicability since it involves the fixing of prices to be charged utilities. When an agency fixes the rates charged by an electric utility, where there is only one company whose rates are being fixed, the impact on the company is virtually that of a *judicial decision*, and it has a *due process* right to be heard. Regardless of its theoretical legislative nature, the proceeding is an adversary one, with the company and the agency as opposing parties who can best present their sides in a *trial-type* format.
>
> The same is not true when rates are general rather than particular in applicability . . . in which the separate fact pattern of each member of the class was not evaluated.

BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 5.8 (3d ed. 1991).

In accord with this Court's cases, when the Oklahoma Corporation Commission sits in judgment to determine the amount of refund Southwestern Bell must give to its customers, the Commission is engaged in a judicial type decision. In the words of this Court, in setting rates "their duties are judicial in nature." *Spring Valley Water-Works v. Schottler,* 110 U.S. at 354. It follows that in ratemaking, as in purely adjudicatory proceedings, Southwestern Bell "was entitled to an impartial decisionmaker." *Michigan Intra-State Motor v. PSC,* 504 N.W.2d 677, 682 (Mich. App. 1993). Indeed, the Oklahoma Supreme Court's decision to the contrary stands alone. For other recent cases, *see Business and Professional v. Barnich,* 614 N.E.2d 341, 345 (Ill. App. 1993); *New England Tel. & Tel. Co. v. PUC,* 448 A.2d 272, 281 (Me. 1982). *Cf. Mass. Auto Rating & ACC v. Commissioner,* 516 N.E.2d 1132, 1141 (Mass. 1987).

The due process requirement of an unbiased decision maker is essential to providing Southwestern Bell, or any other party involved in a particularized rate case, a fair hearing. The cases are replete with instances where administrative decision makers have been disqualified for bias. *See e.g., Gibson v. Berryhill,* 411 U.S. 564 (1973); *Ward v. Village of Monroeville, Ohio,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927); *Cinderella Career & Finishing Schools v. FTC,* 425 F.2d 583, 591 (D.C. Cir. 1970) (disqualification necessary where "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case"); and *American Cyanamid Co. v. FTC,* 363 F.2d 757, 767 (6th Cir. 1966) ("It is fundamental that both unfairness and the appearance of unfairness should be

avoided"). *Cf. Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.*, 113 S.Ct. 2264, 2277 (1993) ("Justice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial even by judges who have no actual bias. . . . [T]he possibility of bias . . . would suffice" as a bar.) (internal quotations and cite omitted).

II. The Oklahoma Supreme Court Erroneously Applied the Rule of Necessity.

In *dicta*, the Oklahoma Supreme Court said that the "Rule of Necessity" would require a biased Corporation Commissioner to sit even when performing judicial functions. 873 P.2d at 1009. The Oklahoma Court reasoned that the rule of necessity needed to be invoked because disqualification of one Commissioner would only leave two, with the possibility of a tie vote. This is simply wrong; a tie vote does not destroy the forum since two commissioners constitute a quorum. *See* Okla. Const. art, 9, Sec. 18a; *Delta Air Lines, Inc. v. CAB*, 497 F.2d 608, 615 (D.C. Cir. 1973) (2-2 vote); and *Stahl v. Board of Supervisors*, 175 N.W. 772, 776 (Iowa 1920) (rule of necessity not applicable even where remaining members may split 1-1). *Cf. Reagan v. Abourezk*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 484 U.S. 1 (1987).

Where employed, the Rule of Necessity is viewed as a necessary evil.[10] "The rule of necessity forces the

---

[10] The Oklahoma "legislature has shown unequivocally its intent to repudiate the 'rule of necessity.' " Maurice H. Merrill, *Oklahoma's New Administrative Procedure Act*, 17 Okla. L. Rev. 1, 35 (1964).

individual to submit to trial before a biased adjudicator. As such, its application should be strictly confined." BERNARD SCHWARTZ, ADMINISTRATIVE LAW Sec. 6.20 (3d ed. 1991). The Rule of Necessity applies "if and only if the dispute cannot otherwise be heard." *General Motors Corp. v. Rosa*, 624 N.E.2d 142, 144 (N.Y. 1993). " '[N]ecessity' must be construed strictly." *Id.* at 145. Due process concerns dictate that "disqualification is the paramount policy, and is only to yield when the necessity is so great and overwhelming that there may be an entire failure of justice." *E.g., State v. Aldridge*, 103 So. 835, 838 (Ala. 1925); *Pillsbury Co. v. FTC*, 354 F.2d 952, 965 (5th Cir. 1966) (court must "seek to find a solution that guarantees a fair tribunal"); and *Jarrott v. Scrivener*, 225 F.Supp. 827, 836 (D.C. 1964) (court ordered creation of new zoning board solely for purpose of hearing matter on which the sitting Board was disqualified). The possibility of a tie vote should not stand between a party and a fair adjudication before an unbiased tribunal.

III. CONCLUSION

In short, this Court has clearly concluded that particularized ratemaking proceedings require a fair hearing, which must include an unbiased decision maker. Other courts, state legislatures, through the Model Acts, and the scholarly commentary agree. It seems painfully obvious to all but the Oklahoma Supreme Court's majority that its decision violates basic principles of administrative law. By sanctioning an agency's use of a biased decision maker in ratemaking cases, it has denied the most basic

of due process rights to all persons, individual or corporate, who find their "property" the subject of a rate hearing in Oklahoma.

For these reasons, this Court should grant certiorari and reverse the decision of the Oklahoma Supreme Court.

Respectfully submitted,

BERNARD SCHWARTZ
Chapman Distinguished Professor
University of Tulsa
College of Law
3120 East 4th Place
Tulsa, Oklahoma 74104
(918) 631-2404

Dated August 4, 1994